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No. 93-490

In The

Supreme Court of the United States

October Term, 1993

PRINCE GEORGE'S COUNTY, MARYLAND,

Petitioner,

vs.

DONALD KIRSCH, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the Court of Appeals of Maryland

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals of Maryland based its decision in *Kirsch v. Prince George's County,* 331 Md. 89, 626 A.2d 372, 380-81 (1993) on independent and adequate state grounds where it plainly stated its decision was based on the Maryland Declaration of Rights?

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RESPONDENTS' BRIEF IN OPPOSITION

COUNTER STATEMENT OF THE CASE

On November 28, 1989, the Prince George's County Council enacted Zoning Ordinance Bill Number CB-152-1989 ("the Ordinance") to regulate and restrict housing for students in otherwise residential areas of the County. This ordinance regulates the use of one, two, or three-family dwellings which are occupied by "at least three (3), but not more than five (5) individuals, all or part of whom are unrelated to one another by blood, adoption, or marriage and who are registered full-time or part-time students at an institute of higher learning." *See* Code of

Prince George's County § 27-107.1.(A) (150.1). (Pet. App. 5a-6a). The Ordinance does not apply at all to housing not occupied by students.

The ordinance establishes several restrictive, and indeed punitive, criteria for the use of these "mini-dormitories," including the requirement that rooms used for sleeping purposes be at least 70 square feet per resident, that there be one parking space per occupant, that all parking spaces be provided on site, that the number of driveway entrances be limited to one entrance per lot, and homeowners must obtain a permit "certifying" the home as a "mini-dormitory." The Maryland Court of Appeals recognized, in its majority decision, that the "burden of complying with the arduous requirements of the ordinance" impacted solely on students based upon their occupation outside the home. *Kirsch v. Prince George's County*, 331 Md. 89, 626 A.2d 372, 381 (1993).

Respondents include potential lessors and students who would be adversely affected by the Ordinance. On July 3, 1990, Respondents filed ~~a complaint for~~ declaratory relief in the Circuit Court for Prince George's County in order to have the Ordinance declared invalid. Respondents moved for an interlocutory injunction in the Circuit Court on February 14, 1993. The motion was granted and cross motions for summary judgment were filed.

Although summary judgment was granted in favor of Prince George's County on August 1, 1991, and affirmed by the Court of Special Appeals of Maryland on July 8, 1992, the Court of Appeals of Maryland reversed, holding that Respondents were denied equal protection under Article 24 of the Maryland Declaration of Rights and the Fourteenth Amendment of the United States Constitution. The Court of Appeals of Maryland held that the Ordinance, which discriminated based upon one's occupation outside the home, was "wholly unrelated to the stated purpose of the ordinance," which was to "address complaints regarding noise, litter and parking

problems from residents of the College Park area." *Kirsch v. Prince George's County,* 331 Md. 89, 626 A.2d 372, 380-81 (1993).

Respondents alleged in their complaint that the Ordinance violated their constitutional rights under Article 24 of the Maryland Declaration of Rights; they also argued that the Ordinance violated the Maryland Declaration of Rights in their Motion for Summary Judgment and Memorandum of Points and Authorities, and before both the Court of Special Appeals of Maryland and the Court of Appeals of Maryland. Both Maryland appellate courts addressed Article 24 of the Maryland Declaration of Rights in their respective opinions.

Respondents thus disagree with Petitioner's cursory and selective analysis of the application and treatment of Article 24 of the Maryland Declaration of Rights by the Court of Appeals of Maryland in Petitioner's Statement of the Case. Given the importance of the application of Maryland's constitution by Maryland's highest court, Respondents will address this important issue in the Argument section of their Reasons for Denying the Petition for Writ of Certiorari. It could not be more clear that the Court of Appeals distinctly decided this case on independent state grounds.

REASONS FOR DENYING THE WRIT

SUMMARY OF ARGUMENT

There are three reasons to deny the Petition for Writ of Certiorari. First, the Court of Appeals of Maryland explicitly decided *Kirsch v. Prince George's County,* 331 Md. 89, 626 A.2d 372 (1993) on independent and adequate state grounds. Second, the holding is in accord with federal constitutional law under the equal protection clause of the Fourteenth Amendment of the United States Constitution. Finally, this state court holding

concerning a county ordinance is not a "serious question of national importance" which threatens to deprive the states of their authority to govern, as suggested and grossly over-stated by Petitioner. (Pet. at 30).

I.

THE COURT OF APPEALS OF MARYLAND DECIDED THIS CASE ON INDEPENDENT AND ADEQUATE STATE GROUNDS.

A. Supreme Court Jurisdiction in State Law Cases.

This Court clarified its jurisdiction to review state court decisions based on state law in *Michigan v. Long*, 463 U.S. 1032 (1983). Citing the dual policies of (1) respect for the independence of state courts, and (2) avoidance of advisory opinions,[1] the Supreme Court reaffirmed its refusal to review state court decisions "where their is an independent and adequate state ground." *Long*, 463 U.S. at 1040.[2]

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1. Justices and commentators alike have cited large and unmanageable Supreme Court dockets and the nature of our federal system as reasons for declining review of state decisions. *See Ponte v. Real*, 471 U.S. 491, 523 (1985) (Marshall, J., dissenting); John Paul Stevens, *Some Thoughts on Judicial Restraint*, 66 Judicature 177, 179 (1982) ("[W]e grant many more cases than we should, thereby making our management problem even more unmanageable."); *Developments — State Constitutions*, 95 Harv. L. Rev. 1324, 1344 (1982) ("If . . . the rights of the people are to continue to enjoy the full measure of the 'double security' afforded by the federalist division, the federal court must exercise special caution before undercutting state protections of rights.")

2. Since *Long*, the review of several state court decisions have been denied by the Supreme Court. *See, e.g., Sochor v. Florida*, 504 U.S. __, 119 L. Ed. 2d 326, 337-338 (1992) (Court lacked jurisdiction to review claim that judge's instruction was unconstitutional, because Florida Supreme Court based its decision on independent and adequate state grounds); *Colorado v. Nunez*, 465

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Further elucidating the issue, Justice O'Connor delivered the following statement of the Supreme Court:

> [W]hen . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached.

Long, 463 U.S. at 1040-41. Therefore, in order to review a state court decision, two factors must be present. First, the state court decision must either (a) fairly appear to rest primarily on federal law, or (b) be interwoven with the federal law. Second, the adequacy and independence of any possible state law ground must not be clear from the face of the opinion. Even if these two factors arise, the state court may insulate its decision from review with a

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U.S. 324 (1984) (writ was improvidently granted on search and seizure issue because the Colorado Supreme Court based its decision on independent and adequate state grounds); *Uhler v. A.F.L.-C.I.O.*, 468 U.S. 1310, 1311 (1984) (Rehnquist, C.J., sitting as circuit justice) (California Supreme Court's analysis of Article V of the United States Constitution would have been reviewable if the California court did not *also* base its decision on independent and adequate state law grounds).

"plain statement" that federal precedents supply only persuasive authority.

In the instant case, the independence and adequacy of the state law basis is clear from the face of the opinion. Furthermore, the Court of Appeals of Maryland made a plain statement that the Supreme Court authority is merely persuasive.

B. The Plain Statement

The Court of Appeals of Maryland began its opinion by citing the equal protection clause of the Fourteenth Amendment of the United States Constitution and Article 24 of Maryland's Declaration of Rights. Maryland's highest court stressed that "equal protection is implicitly guaranteed by the due process provision found in Article 24 of the Declaration of Rights." *Kirsch*, 626 A.2d at 375 (citing twelve different Maryland cases for support: *Murphy v. Edmonds*, 325 Md. 342, 353, 601 A.2d 102, 107 (1992); *Hargrove v. Board of Trustees*, 310 Md. 406, 416, 529 A.2d 1372, 1377 (1987); *cert. denied*, 484 U.S. 1027, 108 S. Ct. 753, 98 L. Ed. 2d 766 (1988); *United Wire v. State Deposit Ins. Fund*, 307 Md. 148, 157, 512 A.2d 1047, 1052 (1986); *Ennis v. State*, 306 Md. 579, 591, 510 A. 2d 573, 579 (1986); *State v. Wyand*, 304 Md. 721, 726, 501 A.2d 43, 46 (1985); *cert. denied*, 475 U.S. 1095, 106 S. Ct. 1492, 89 L. Ed. 2d 893 (1986); *Loveday v. State*, 296 Md. 226, 241, 462 A.2d 58, 65 (1983); *Hornbeck v. Somerset Co. Bd. of Educ.*, 295 Md. 597, 640, 458 A.2d 758, 768, 780-81 (1983); *Lawrence v. State*, 295 Md. 557, 559-60, 457 A.2d 1127, 1128 (1983); *Attorney General v. Waldron*, 289 Md. 683, 704-05, 426 A.2d 929, 940-41 (1981); *Board of Supervisors of Elections v. Goodsell*, 284 Md. 279, 293 n. 7, 396 A.2d 1033, 1044 n. 7 (1978); *Governor v. Exxon Corp.*, 279 Md. 410, 438 n. 8, 370 A.2d 1102, 1118 n. 8 (1977), *aff'd*, 437 U.S. 117, 98 S. Ct. 2207, 57 L. Ed. 2d 91 (1978); *Bruce v. Director, Chesapeake Bay Affairs*, 261 Md. 585, 600, 276 A.2d 200, 208 (1971)).

The *Kirsch* court then *plainly stated* that the Fourteenth Amendment and Article 24 are "*independent* of one another, and a violation of one is not necessarily a violation of the other. *See Hornbeck . . . ; Waldron . . . .*" *Id.* at 376 (emphasis added). In so ruling, the Court of Appeals of Maryland cited two important Maryland cases: (1) *Hornbeck v. Somerset Co. Bd. of Educ.*, 295 Md. 597, 640, 458 A.2d 758, 781 (1983), and (2) *Attorney General v. Waldron*, 289 Md. 683, 704-05, 426 A.2d 929, 941.

On the page cited to in *Hornbeck*, the Court of Appeals of Maryland held that "decisions of the Supreme Court interpreting the equal protection clause of the federal constitution are *persuasive authority* in cases involving the equal treatment provisions of Article 24." *Hornbeck*, 295 Md. at 640, 458 A.2d at 781. In the cited case *Waldron*, the Court of Appeals explained that "the application of Article 24 of the Maryland Declaration of Rights may require a result *at variance* with the Supreme Court's application of the fourteenth amendment's equal protection clause." *Waldron*, 289 Md. 683, 426 A.2d at 946 n. 20 (emphasis added). The *Waldron* court then adopted the language of the North Dakota Supreme Court:

> While some of our decisions would pass muster under the . . . "traditional" equal protection analysis, it may be that some of our statutes which we have declared unconstitutional might have passed the Federal constitutional screening. Such results are to be expected under a dual constitutional system. The Federal courts examine State statutes only to determine if they comply with the United States Constitutional mandates . . . ; we examine them for the that purpose and also to determine if they comply with State Constitutional mandates . . . . No one should be

> surprised if a statute passes the one set of standards and not the other.

Id. (citing *Johnson v. Hassett*, 217 N.W. 2d 771, 775-76 (N.D. 1974). The Maryland Court of Appeals has lucidly stated that its interpretation of its own constitution may, quite naturally, differ from this Court's interpretation of the Federal Constitution. The Maryland Court thus also restated the commonly accepted maxim that protection of individual rights under the State Constitution may exceed the protection afforded by the Federal Constitution. *See e.g., Pruneyard Shopping Center v. Robins,* 447 U.S. 74, 82-88 (1980).

Therefore, by *plainly asserting* that Article 24 is independent of the Fourteenth Amendment and that "a violation of one is not necessarily a violation of another," the Court of Appeals of Maryland plainly established that (1) United States Supreme Court cases are merely persuasive authority in interpreting Article 24, and, (2) although a case may not violate the Fourteenth Amendment, it may nonetheless violate Article 24. Given this plain statement, the decision of Maryland's highest court should not be disturbed.

C. Independent and Adequate State Grounds.

In addition to this "plain statement," the independence and adequacy of the state grounds for the decision by the Court of Appeals of Maryland is clear from the face of the opinion.

First, the Court of Appeals of Maryland expressly cites the Maryland case of *Murphy v. Edmunds*, 325 Md. 342, 355-357, 601 A.2d at 108-09 for an enunciation of *Maryland's* equal protection analysis. The Court of Appeals of Maryland *fails to cite a single Supreme Court case* for the *Supreme Court's* enunciation of the rational basis test. *See* 626 A.2d at 376.

Second, *immediately* before the Court overturned the Ordinance because it is an irrational classification "based solely on occupation," *Kirsch,* 626 A.2d 380, the Court cited the holdings of *six Maryland cases* where the Court of Appeals of Maryland has invalidated "classifications in statutes regulating the pursuit of occupations where those classifications lacked a rational relation to a legitimate governmental purpose." *Kirsch,* 626 A.2d at 379-80.[3]

Although well before beginning its analysis of the Ordinance, the Court of Appeals of Maryland listed the holdings of several Supreme Court cases, *none* of these Supreme Court cases addressed statutory classifications based on *occupation.* One case dealt with classifications based on mental health, while the others dealt with classifications based on residency. These Supreme Court cases were simply addressed to support the proposition that the Supreme Court has in the past invalidated legislative classifications under rational basis scrutiny. *Kirsch,* 626 A.2d at 376. Thus, as adduced above, the Supreme Court precedents were merely persuasive authority in interpreting Article 24 of the Maryland Declaration of Rights.

Therefore, (1) the statement of the independent status of Article 24 of the Maryland Declaration of Rights, (2) the express citation to *Murphy v. Edmunds,* 325 Md. 342, 601 A.2d 102 (1992) for an enunciation of the rational-basis test under Article 24 of the Maryland Declaration of Rights, and (3) the reference to six Maryland cases (and no Supreme Court cases) which hold that

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3. These cases were *Wheeler v. State,* 281 Md. 593, 606, 380 A.2d 1052, 1060 (1977); *Maryland State Bd. of Barber Examiners v. Kuhn,* 270 Md. 496, 312 A.2d 216 (1973); *Bruce v. Director, Chesapeake Bay Aff.,* 261 Md. 585, 276 A.2d 200 (1971); *Schneider v. Duer,* 170 Md. 326, 184 A. 914 (1936); *Dasch v. Jackson,* 170 Md. 251, 183 A. 534 (1936); *Havre de Grace v. Johnson,* 143 Md. 601, 123 A. 65 (1923).

classifications regulating the pursuit of occupations that bear no rational relation to a legitimate government objective will be invalidated, plainly indicate that the Court of Appeals of Maryland relied on "independent" state grounds for its decision. The state law is also "adequate" since the Court of Appeals of Maryland relied on substantial state law concerning classifications based on occupation to conclude that the Ordinance violates *its* state rational basis test. Finally, it must not be ignored that the Court of Appeals explicitly held that the ordinance at issue violated the Maryland constitution.

II.

THE COURT OF APPEALS OF MARYLAND'S CITATION OF FEDERAL LAW AS PERSUASIVE AUTHORITY WAS CORRECT, AND, THEREFORE, SHOULD NOT BE REVIEWED.

Even assuming that the Court of Appeals' decision may be considered to rest on federal grounds, the writ should nevertheless be denied. The decision below is correct and is not in conflict with the decisions of any federal court of appeals or state court of last resort.

Equal protection analysis largely depends on "the circumstances of each case." *Griffin v. School Bd. of Prince Edward Cty.*, 377 U.S. 218, 230 (1964). In fulfilling its role as the highest court in the State of Maryland, the Court of Appeals of Maryland properly addressed federal precedents in analyzing the unique circumstances involving the Ordinance.

In *City of Cleburne v. Cleburne Living Center,* 473 U.S. 432 (1985), the Supreme Court used rational basic analysis to invalidate a city ordinance which required a special use permit for particular group homes, such as homes occupied by the mentally

retarded. Special use permits were not required for "apartment houses, multiple dwellings, boarding and lodging houses, fraternity or sorority houses, dormitories, apartment houses, hospitals, sanitariums, nursing homes for convalescents or the aged . . . private clubs or fraternal orders, and other specified uses." *Id.* at 447. Although the mentally retarded were treated by the Court as "different," the "difference is largely irrelevant" unless a mentally retarded group home would threaten the city's legitimate interest in ways that the aforementioned group homes would not. Since there was no "rational basis" to make this conclusion, the Court invalidated the ordinance.

In the instant case, special regulations were imposed by Prince George's County for residences housing persons attending an "institution of higher education" on a full or part-time basis, in order to forward the interest of clearing residential neighborhoods of noise, litter, and parking congestion. As in *Cleburne,* the Ordinance contains no equivalent restrictions for boarding and lodging houses, fraternity or sorority houses, or other group residential facilities which are located within the same zone. In fact, a group of three to five unrelated young adults, senior citizens, or professionals could live together in a group house and would not be subject to the burdensome and restrictive requirements of the Ordinance; that is, until one of them attended an institute of higher learning on at least a part-time basis. As in *Cleburne,* and as recognized by the Maryland Court of Appeals, there is no "rational basis" to conclude that a person who occupies their time outside the home by attending an "institution of higher education," full-time or part-time, would threaten the county's objectives in any way that a person not attending an "institution of higher education" would threaten those objectives.

Although students may be unpopular, *Cleburne* made clear that "a bare . . . . desire to harm a politically unpopular group" is "not a legitimate state interest." *Id.* at 446-47. Such a desire is

particularly objectionable when the Supreme Court has called education "perhaps the most important function of state and local governments . . . . It is the very foundation of good citizenship." *Brown v. Board of Education,* 347 U.S. 483, 493 (1953). While in *Cleburne* the ordinance appeared "to rest on irrational prejudice against the mentally retarded," *Cleburne* at 450, this Ordinance appears to rest on irrational prejudice against students.[4]

Petitioner argues that the Court of Appeals of Maryland misinterpreted *Village of Belle Terre v. Boraas,* 416 U.S. 1 (1974) since Petitioner believes that "*Boraas* validates all rationally based zoning laws that promote the preservation of family oriented neighborhoods without using invidious discrimination." (Pet. at 18).

Boraas, however, was properly distinguished by the Court of Appeals of Maryland. In *Boraas,* the single family character of a zone was preserved by preventing those who did not fit the definition of "family" from living together, regardless of whether the occupants were attorneys, students, construction workers, fast food restaurant employees, etc.[5] The question in the instant case is not whether students occupying a home are a "family," but whether students are treated dissimilarly to others, who also happen not to be part of a family, based solely on *occupation* outside the home. As stated by the Court of Appeals:

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4. The Petitioner, who pontificates that it is a "simple reality that college students tend to create the type of disturbances that prevent a neighborhood from being a 'sanctuary,' " (Pet. at 16), should become acquainted with, *inter alia,* the Golden I.D. Student Association, "an organization of retired senior citizens who are registered full-time or part-time students at the University of Maryland College Park." (Court of Appeals of Maryland, Brief of Amici Curiae at 10).

5. Importantly, the *Boraas* statute *never* specified "students" in the legislation.

> Unlike the zoning ordinance analyzed in *Boraas,* the Prince George's County "mini-dorm" ordinance does not differentiate based on the nature of the use of the property, such as a fraternity house or a lodging house, but rather on the occupation of the persons who would dwell therein. Therefore, under the ordinance a landlord of a building originally constructed as a one, two or three family dwelling is permitted to rent the same for occupancy by three to five unrelated persons so long as they are not pursuing a higher education without incurring the burdens of complying with the arduous requirements of the ordinance. 26 A.2d at 381. (Pet. App. 41a-42a.)

Therefore, even if the dictate of *Boraas* was to "validate all rationally based zoning laws that promote the preservation of family oriented neighborhoods without using invidious discrimination," the Ordinance here is *not rationally based* because, as suggested by the Court of Appeals of Maryland, the Ordinance differentiates among non-family members based on "the occupation of the students who would dwell therein." *Kirsch,* 626 A.2d at 381. And, unlike *Boraas,* "[s]uch a zoning classification of residential property is wholly unrelated to the stated purpose of the ordinance." *Id.*

The distinction made by the Court of Appeals is valid and perfectly logical. If the argument made by the County were true as to the breadth of *Boraas,* then this Court could not have decided *Cleburne* in the manner that it did.[6]

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6. The Petitioner mentions, but fails to discuss the facts of *F.C.C. v. Beach Communications, Inc.*, 508 U.S. ___, 113 S. Ct. 2096 (1993). Petitioner's omission surely stems from the fact that *Beach* is wholly distinguishable. *Beach*

(Cont'd)

Thus, even if the Court of Appeals of Maryland relied on federal precedents to decide *Kirsch,* the Court properly applied those precedents to the unique circumstance involving the county ordinance at issue. As a result, the petition for writ or certiorari should be denied.

III.

THE ORDINANCE IS NOT A "SERIOUS QUESTION OF NATIONAL IMPORTANCE" WHICH THREATENS TO DEPRIVE THE STATES OF THEIR AUTHORITY TO GOVERN.

In petitioning this Honorable Court, Petitioner predicts both "dire effects," and a domino effect in other states as a result of the decision below. In so doing, Petitioner ignores the fact that the Court of Appeals of Maryland, as the highest court in the state, is better equipped than a federal court to address issues involving Maryland docket management and local Maryland ordinances due to the familiarity of the Court of Appeals of Maryland with those issues. And the Maryland Court of Appeals is certainly well-versed in Maryland zoning law and related issues. Zoning within particular Maryland counties is surely not a matter of national concern.

Local governments in Maryland, despite Petitioner's apocalyptic predictions, will continue to effectively zone their

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concerned no unpopular groups (Petitioner cannot seriously maintain that common owners of satellite master antenna television systems are a group of persons who faced hostility from the legislature and the community). Nor was there discrimination based on "occupation." Indeed, *Beach* concerned a purely economic regulation. This case, therefore, is most akin to *Cleburne,* and not *Beach,* which did not even discuss, and certainly did not purport to overrule the *Cleburne* decision. *Cleburne* remains binding authority.

territory and govern their citizens. Such governments must only be sure that legislative classifications do not deny its citizens equal protection under the law.

The Court of Appeals simply decided one case based on its unique set of facts that will have little effect, if any, on the passage of future legislation. The Court of Appeals has merely decided that Prince George's County, Maryland, cannot single out specific groups of persons, based on their student status or their occupation, for special burdens. This is a sensible and mandated result, and also one that is in conformity with the anti-discrimination statutes (including the Prince George's County Human Relations Act) of many jurisdictions, which prohibit discrimination based on occupational status.

Moreover, Petitioner's prediction that *Kirsch* will be "persuasive authority" in other jurisdictions is unfounded in terms of both practicality and history. As noted by this Court, equal protection analysis largely depends on "the circumstances of each case." *Griffin v. School Bd. of Prince Edward Cty.*, 377 U.S. 218, 230 (1964). Historically, Maryland cases involving equal protection analysis (especially when the decision, as this one, is based on the State constitution) are rarely referred to, much less relied upon, by other jurisdictions. For instance, out of the six opinions cited by the Court of Appeals of Maryland involving irrational legislative classifications based on occupation, only once has an opinion been relied upon by another jurisdiction.[7] The six cited cases have been *mentioned* by other jurisdictions only five times over a span of 70 years,[8] and have never been referred to by

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7. *Havre de Grace v. Johnson*, 143 Md. 601, 123 A. 65 (1923), was relied on by the United States District Court for the Western District of Missouri in 1927 in *Campbell Banking Co. v. City of Harrisonville, Mo.*, 19 F.2d 159, 160 (W.D. Mo. 1927).

8. *Wheeler v. State*, 281 Md. 593, 606, 380 A.2d 1052, 1060 (1977) was (Cont'd)

another state court. Accordingly, Petitioner's doomsday approach to petitioning this Honorable Court is unfounded and greatly exaggerated.

CONCLUSION

For the foregoing reasons, the petitioner respectfully requests this Honorable Court to reject Petitioner's petition for writ of certiorari.

Respectfully submitted,

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mentioned in *Upper Midwest Booksellers v. City of Minneapolis*, 780 F.2d 1389,1405 (8th Cir. 1985), and expressly not followed in *Northside Sanitary Landfill v. Indianapolis*, 902 F.2d 521 (7th Cir. 1990). *Maryland State Bd. of Barber Examiners v. Kuhn*, 270 Md. 496, 312 A.2d 216 (1973) was referred to in *Martineau v. Ghezzi*, 389 F. Supp. 187 (N.D.N.Y 1974). *Bruce v. Director, Chesapeake Bay Aff.*, 261 Md. 585, 600, 27 A.2d 200, 208 (1971) was distinguished in *Bigelow v. Michigan Dept. of Natural Resources*, 727 F. Supp. 346 (W.D. Mich. 1989).